

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In The Matter Of:

NORTH PLATTE VETERINARY CLINIC

Respondent.

**Docket No. FMCSA-2009-0336¹
(Midwestern Service Center)**

ORDER TERMINATING PROCEEDING AND CLOSING DOCKET

On January 22, 2010, the Midwestern Field Administrator for the Federal Motor Carrier Safety Administration (Claimant) submitted a Notice of Settlement and Motion to Close Docket. Claimant and Respondent entered into a Settlement Agreement that resolves the matters at issue here.

The Notice of Claim served on August 1, 2007, proposed a civil penalty of \$1,570 based upon one violation of 49 CFR 382.115(a), failing to implement an alcohol and/or controlled substances program; one violation of 49 CFR 383.23(a), operating a commercial motor vehicle without a valid commercial drivers license; and one violation of 49 CFR 395.8(a), failing to require a driver to make a record of duty status. Under the Settlement Agreement, which was executed on January 21, 2010, and adopted as a Final Order,² Respondent agreed to pay \$785 in two monthly payments. The remaining \$785 of the original civil penalty amount was suspended, provided Respondent: (1) pays the non-suspended portion of the civil penalty in accordance with the terms of the

¹ The prior case number was NE-2006-0081-US0264.

² Settlement Agreement, paragraph 8.

Agreement; and (2) successfully complies with 49 CFR parts 382, 383 or 395 at the conclusion of any investigation conducted within one year from the date of execution of the Agreement.³

Paragraph 3B of the Agreement provides that discovery of an acute violation within 49 CFR parts 382, 383 or 395, or discovery of critical violations within these parts equaling or exceeding 10%, will constitute failure to abide by the terms of the agreement. The last sentence of that paragraph states, in part: "...the conditionally suspended amount of \$785 will be due within **30 days of service of notice by FMCSA of a breach of the settlement agreement.**" (Boldface type in original). This provision is at odds with the Agency's recent decisions in *In the Matter of Big Foot Transportation, Inc., dba Speedway*.⁴ In these decisions, we held that penalties suspended in a Settlement Agreement could not be reinstated based on subsequent noncompliance with acute or critical regulations without first giving the respondent the opportunity to adjudicate the alleged noncompliance in a civil penalty proceeding under 49 CFR part 386.

The first sentence of paragraph 6 of the Settlement Agreement provides: "Failure to pay in accordance with the terms of the settlement agreement and/or failure to comply with the terms and conditions of this settlement agreement shall be considered a breach of this settlement agreement and may result in the reinstatement of any penalties held in abeyance and may also result in the loss of any reduction in civil penalties asserted in the

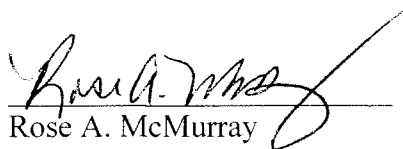
³ Under paragraph 3A of the Agreement, successful compliance with parts 382, 383 or 395 means no violations of acute regulations and/or no violations of critical regulations at a violation rate equaling or exceeding 10%.

⁴ Docket No. FMCSA-2007-27601, Final Order, April 3, 2009; and Order Denying Petition for Reconsideration, September 30, 2009.

Notice of Claim, in which case the original amount asserted in the Notice of Claim (less any payments previously made) will be due immediately." (Emphasis supplied). Aside from being inconsistent with the 30-day provision of paragraph 3B, the language quoted above is also at odds with the *Big Foot Transportation* decisions because it provides for immediate reinstatement of suspended penalties based on violations of certain regulations found in a subsequent investigation without first giving the respondent the opportunity to adjudicate the alleged noncompliance in a civil penalty proceeding under 49 CFR part 386.

Consequently, the last sentence of paragraph 3B is void, as is the first sentence of paragraph 6, but only to the extent it provides for immediate reinstatement of suspended penalties based on noncompliance with paragraph 3B. Except for these invalid provisions, the settlement is in the public interest and is accepted.⁵

THEREFORE, *It Is Hereby Ordered*, the Settlement Agreement, as modified, is the Final Order in this matter, the proceeding is dismissed, and the docket is closed.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

2.24.10
Date

⁵ See 49 CFR 386.22. Under paragraph 15 of the Settlement Agreement, invalidation of any provision of the Agreement does not invalidate the rest of the Agreement, which shall be construed as if it did not contain the invalid part.

CERTIFICATE OF SERVICE

This is to certify that on this 25 day of February, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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